Supreme Court, U.S.
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No. 92-1638

IN THE

Supreme Court of the United States

October Term 1992

JANET LEVER,

Petitioner,

v.

NORTHWESTERN UNIVERSITY,
RAYMOND MACK, PROVOST,
RUDOLPH WEINGARTNER, DEAN,
COLLEGE OF ARTS AND SCIENCES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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May 18, 1993

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QUESTION PRESENTED

Must an employer's communication of an adverse employment decision to an employee be unequivocal and unambiguous in order to satisfy the "made and communicated" requirement of *Delaware State College* v. *Ricks*, 449 U.S. 250 (1980), before the short statute of limitations period applicable to Title VII claims may begin to run against the employee?

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Respondents herein assert that the Seventh Circuit "merely examined the district court's specific factual findings and determined that they were not clearly erroneous." Resp. at 2.[1] By trying to treat the matter below as just another factual dispute, respondents seek to turn the fundamental problem presented by the Seventh Circuit's approach into an ordinary event. The fundamental problem is precisely that the courts

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1. Citations to "Resp. at ____" are to Respondents' Brief in Opposition.

below had nothing to work with except admittedly ambiguous and uncertain facts and circumstances as to notice and yet managed to find on disputed facts that Professor Lever received notice sufficient under Title VII. It is the very fact that the matter below required resolution of a factual dispute where the court recognized factual ambiguity as to notice that places the Seventh Circuit in conflict with other courts.

If in cases involving vague and ambiguous communications notice is to be a matter of lengthy dispute and fact finding, the issue of notice to the employee will become a regular subject of doubt and debate and a potentially serious trap for the unwary employee. Meritorious claims among the more than 70,000 Title VII claims filed each year may well be stifled because an employee is uncertain — due to ambiguity in the procedures of the employer — as to the consequences of employer action. Moreover, the unfortunate byproduct of the Seventh Circuit's decision is that it provides an incentive for employers to follow Northwestern's example and cloud their employment decisions with doubt thereby insulating themselves from liability.

As respondents admit in their brief, the opinion of the Seventh Circuit recognizes that "Northwestern's rules shroud the identity of the decisionmaker" in the tenure process (App. A-3), that "[o]ne could read the [University's faculty handbooks] as saying that the Dean does nothing but recommend, leaving the decision to the Provost" (App. A-5), and that "Northwestern could do its faculty (and the courts) a favor by writing accurate descriptions of its procedures [because] [t]he handbooks are vague and can be understood to describe steps inconsistent with the process that . . . Northwestern actually follows" (App. A-10). The circuit court of appeals examined the published and practiced procedures of Northwestern's tenure process and, contrary to the findings of the district

court, found them to be vague, equivocal and internally inconsistent. Under such circumstances, notice cannot have been sufficient.

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May 18, 1993

Respectfully submitted,

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